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No. 09-1303

Supreme Court, U.S.
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In The Supreme Court of the United States

DON W. SMITH AND DONNA L. SMITH,
Petitioners,

v.

MICHAEL R. MCCARTHY,
IN HIS INDIVIDUAL CAPACITY AND IN HIS CAPACITY AS A NELSON COUNTY DEPUTY SHERIFF, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF

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ARGUMENT

I. STATE RESPONDENTS, PRESENT GOVERNOR ROBERT F. MCDONNELL, PAST GOVERNOR TIMOTHY M. KAINE, SHANNON Y. DION AND JOSEPH L. RADER FAILED TO FILE A BRIEF IN OPPOSITION TO THE SMITHS' PETITION WHICH, AS TO THEM, IS UNANSWERABLE.

State respondents, Governor Robert F. McDonnell, past Governor Timothy M. Kaine, Assistant Attorney General and Virginia State Police Counsel Shannon Y. Dion and State Trooper Joseph L. Rader failed to file a brief in opposition. Considering that the petition had nothing at all positive to say about these respondents, one would imagine that these respondents would "perceive" a misstatement of fact or law within the meaning of Supreme Court Rule 15. By failing to respond, and because none of the petition was defective in any way as to the issue of jurisdiction, those respondents may have waived any objection and defenses to the petition because their alleged ratification of the corrupt trial of August 2, 2006, is unanswerable.

Perhaps the certain prospect of a motion to disqualify the Virginia Attorney General's Office from representation of respondents was one reason for the failure to file a brief. The self-evident grounds justifying disqualification are premised on a foundation principle of American jurisprudence that the Smiths are entitled, as law-abiding, innocent victims of crime, which they have clearly showed themselves to be, to have the Commonwealth discharge her duty of protecting them as such. That

duty of protection, by its inherent nature, absolutely prohibits the Commonwealth from defending the egregious conduct which led to the victimhood. Avoidance of this absolute prohibition is why respondents repeatedly attempt to mischaracterize the nature of the Smiths' complaint as their mere desire that perjury be prosecuted.

II. THE BRIEF IN OPPOSITION FILED BY THE REMAINING RESPONDENTS FAILS IN ALL RESPECTS TO COMPLY WITH THE ADMONITION OF RULE 15 THAT IT "ADDRESS ANY PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION" AS IT RELATES TO ISSUES WHICH COULD COME BEFORE THE SUPREME COURT.

Respondents' brief fails to comply with the requirement of Supreme Court Rule 15 that the brief address "any perceived misstatement of fact or law in the petition" as it relates to issues which could be before the court. The arguments are wholly without merit, leaving uncontested almost every statement of law and fact made by petitioners.

First, nowhere in the brief in opposition do respondents address the statements of fact and law that both courts failed in their duty to assume that all allegations of the complaint are true; to construe the complaint in the light most favorable to petitioners; to make all reasonable inferences in favor of petitioners and to determine, under any reasonable reading of the complaint, that petitioners are entitled to relief.

Second, other than a nonsensical argument to justify the judicial usurpation of the jury's function by validating a corrupt conviction, the brief failed to address the statements made in the petition that the Fourth Circuit approved the District Court's improper use of the trial transcript of the prosecution which was alleged in the complaint as the objective of a civil conspiracy and the knowing reliance of both courts on false evidence in approving the corrupt conviction of petitioner Donna L. Smith.

Third, the brief failed to address the statements made in the petition that the Fourth Circuit circumvented well-established limitation of actions law based on conspiracy in dismissing the claims of the Smiths on the basis that they were barred by the applicable statute of limitations. However, the statute of limitations has not yet run because of a change in the ultimate objective of the conspiracy.

Fourth, the brief failed to address the statements made in the petition complaining of the both lower courts' grant of qualified immunity to respondents McCarthy, Bridgwater, Dixon and Brantley, even though they had the burden of proof, and in spite of the detailed allegations of the complaint showing joint and several constitutional violations, including malicious wounding, breach of duty to arrest, illegal arrest, search, seizure and imprisonment, fabrication and/or alteration of evidence, failure to provide exculpatory evidence, reckless or callous supervisory indifference to petitioners' rights, and perjury.

Fifth, the brief failed to address the statements made in the petition that the Fourth Circuit circumvented law by affirming the dismissal of respondent Payne as absolutely immune even though Payne had the burden of proof, and in spite of the detailed allegations of the complaint showing his advice to the sheriff defendants and administration of the prosecution conspiracy outside of the judicial process continuing to this very day and in doing so, disregarded the decisions of this Court in *Burns v. Reed*, 500 US. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

III. RESPONDENTS ARGUMENT "A", CLAIMING THAT PETITIONERS HAVE NOT SHOWN "COMPELLING REASONS" FOR THE GRANTING OF THE WRIT OF CERTIORARI, IS WHOLLY WITHOUT MERIT.

Respondents' entire Argument "A" consists of a paraphrase of the provisions of Supreme Court Rule 10 in the first paragraph and two misleading statements in the second paragraph. The first false statement claims that petitioners "do not point to any of the compelling reasons cited in Rule 10 to support their petition for writ of certiorari." Yet on the first page of their petition, petitioners clearly state that the decision of the Fourth Circuit Court of Appeals "directly conflicts with the holdings of every Circuit Court of Appeals....which has considered the issues and numerous decisions of the United States Supreme Court." (Pet. at i). There is no need for petitioners to perform a detailed analysis of a circuit-by-circuit review of the conflicts when they are self-evident and repeatedly documented in the petition

which contains citations from the Second, Third, Fourth, Fifth, Seventh and Ninth Circuit Court of Appeals and the United States Supreme Court, everyone of which directly conflict with the decision of the Fourth Circuit Court of Appeals before this Court. Sup. Ct. Rule 10(c).

The second misleading statement purports to mischaracterize the compelling reasons for granting the writ as a "mere argument" that the Fourth Circuit "misapplied" federal law. Respondents use this "reduction" and "misapplication" approach in all their arguments in an attempt to divert the attention of this Court. (Resp. Br. pp. 6, 8, 9, 10, 11). The petition is emphatically not a *mere* argument about a *mere* application of the law. The petition states at the outset, and proves, that both lower courts flagrantly violated and circumvented law in highly unethical decisions to extricate the respondents from their predicament and in doing so, both courts deprived petitioners of their Seventh Amendment right to a jury trial. The petition clearly demonstrates that the Fourth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

Finally, Argument A ends with a footnote claiming that petitioners' should be denied a writ because they characterize the two lower courts as "judicially dishonest" and "obviously intending" to protect all respondents from the consequences of their illegal actions, claiming that petitioners have made "argumentative and conclusory statements"

which are "factually unsupported" with "ofttimes incredible conclusions." The factual support which clearly establishes the "judicial dishonesty" and "obvious intent" of both the District Court and the Fourth Circuit are found in the decisions themselves. The reasoning of the opinions is tortured at best and totally ignores the essential issues of the case, which it must do if respondents are to escape liability. The respondents are the only parties before this Court making "argumentative and conclusory statements" which are "factually unsupported and reaching "ofttimes incredible conclusions."

IV. RESPONDENTS' ARGUMENT "B", RELATING TO THE LOWER COURTS' "CONSIDERATION" OF THE TRIAL TRANSCRIPT IS NONSENSICAL AND DOES NOT ADDRESS THE WELL-ESTABLISHED LAW WHICH DICTATES HOW THE COURTS SHOULD HAVE CONSIDERED THE TRIAL TRANSCRIPT.

Respondents again make misleading statements and begin, in their Argument B, by avoiding the threshold issue of **how** each court was obligated to consider the transcript. Of course, the complaint made reference to the trial transcript because the trial transcript is the basis of the corrupt conviction is the essential basis of petitioners' claims. Had the Smiths failed to hire a court reporter for the August 2, 2006, trial, Donna Smith's corrupt conviction would have been history. Any references to the transcript indicated multiple instances of perjury on relevant issues and under an appropriate disposition of a Rule 12(b) motion, both

courts were obligated to assume the perjury to have occurred even if it weren't proven on the face of the complaint.

Petitioners never asked the District Court to consider the transcript, assuming the court would read it to understand the true nature of the August 2, 2006, trial, and then rule according to the law governing Rule 12(b) motions. Petitioners' attorney did not refer to the transcript during the December 19, 2008, because there was no need to. Respondents' intimation that petitioners' accusation of judicial dishonesty is solely based on both courts' "relying upon portions of the transcript that the Petitioners do not like" is beneath contempt. What petitioners "do not like" about both courts is their reliance on what is clearly and convincingly corrupt conviction. If the Court grants the writ, the transcript will be part of the record. No reasonably educated judge or lawyer could read it without being firmly convinced that the Commonwealth fixed the outcome of the trial.

V. RESPONDENTS' CLAIM THAT PETITIONERS HAVE MISSTATED THE LOWER COURTS' STATUTE OF LIMITATIONS ANALYSIS IS UNTRUE, AND ONCE THE COMPLAINT WAS TIMELY FILED, THE ULTIMATE OBJECTIVE OF THE CONSPIRACY WAS CHANGED TO OBTAINING JUDICIAL VALIDITY OF THE CORRUPT AUGUST 2, 2006, CONVICTION, SO THAT THE STATUTE OF LIMITATIONS HAS NOT YET RUN UNDER THE DECISION OF THE UNITED STATES SUPREME COURT IN

GRUNEWALD V. UNITED STATES, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed.2d 931 (1957).

Petitioners' argument that the lower courts' holdings relative to application of the statute of limitations to petitioners' claims of conspiracy are vague and muddled remains in full force and effect unaffected by respondents' contribution to that confusion in their brief. This is a very simple issue and the very fact that the respondents fail to see its simplicity is indicative of their desire to find some escape from liability for their egregious acts.

The malicious wounding of Donna Smith by McCarthy is the basic operative fact when dealing with the limitations issue. That same malicious wounding marks the onset of the conspiracy which begins precisely when Donna Smith is in the ditch being brutally handcuffed by McCarthy and Bridgwater, rather than arresting McCarthy for the felony committed in his presence, chooses instead to subdue Don Smith who attempted to save his wife from McCarthy's brutality. Everything that happened thereafter would be heard by the jury, after discovery had been completed and the case came to trial, including the excessive force used by McCarthy and Bridgwater in subduing the Smiths, the arrest of the Smiths, and all other acts of the respondents Payne, McCarthy, Bridgwater, Dixon and Brantley leading to the conviction of Donna Smith on August 2, 2006.

However, the timely filing of the complaint changed the ultimate objective of the conspiracy. Once the complaint was timely filed, all respondents

were deprived of an affirmative statute of limitations defense. So deprived, respondents, if they were to escape liability, had no choice but to the change the ultimate objective of the conspiracy to obtaining judicial approval of the corrupt conviction. Instructive in this regard is the decision of this Court in *Grunewald v. United States*, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed.2d 931 (1957) in which the government argued that the central aim of the conspiracy was to obtain for the taxpayer defendants not only a 'no prosecution' ruling from the Internal Revenue Service but absolute immunity for *any* tax prosecution. Since that immunity would not be attained until the criminal statute of limitations ran on the tax cases which the taxpayers undertook to 'fix', this Court essentially ruled that the prosecutions were timely brought. Applying the reasoning of *Grunewald* to the case at bar, the August 2d conviction of Donna Smith equates with the "no prosecution" ruling and the judicial validation of a corrupt conviction by the District Court and the Fourth Circuit equates to the deadline of the five year statute in *Grunewald*. Unless this Court affirms the Fourth Circuit, the statute of limitations has not yet run on the Smiths' claims for the wrongful acts of respondents and others, whether before or after August 2, 2006. Under this most compelling analysis, once this case is remanded to the District Court for trial, a large number defendants could conceivably be joined as defendants. Petitioners foresaw this probability because the last listed defendants in the caption of their complaint are described as "UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State

Police, the Attorney General and/or the Governor." (App. at 67a).

VI. RESPONDENTS' ARGUMENT "D", CLAIMING THERE ARE NO FACTS IN THE COMPLAINT SUPPORTING A CONSPIRACY SO THAT THE COMPLAINT FAILS TO MEET THE STANDARD OF PLAUSIBILITY SET FORTH IN *ASHCROFT V. IQBAL*, IS FRIVOLOUS AND WHOLLY WITHOUT MERIT.

The first paragraph of respondents' argument "D" recites the law which both courts were obligated to follow when passing on the sufficiency of the complaint and, of course, ignores the law which repeatedly is cited by the petitioners as controlling. The second and third paragraphs are no more than a regurgitation of portions of the opinion of the Fourth Circuit with a conclusory statement that the complaint failed to meet the plausibility standard discussed by this Court in *Ashcroft v. Iqbar*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) which decision did not change one iota the well-established law that any court, when passing on a Rule 12(b)(6) motion, must assume that all allegations of the complaint are true, must construe the complaint in the light most favorable to petitioners, must make all reasonable inferences in favor of petitioners and must determine, under any reasonable reading of the complaint, whether petitioners are entitled to relief. In short, the complaint overwhelmingly satisfies the standard of plausibility enunciated in *Ashcroft v. Iqbar*.

Petitioners have addressed the frivolity of this argument which assumes the facts set forth in the complaint are the sum total of the evidence which petitioners could muster at trial. The argument is akin to the analysis which a court would make when ruling on a motion for judgment of acquittal in a criminal prosecution. Perhaps respondents understandably perceive the complaint as a prosecution. But petitioners stress that this is a civil matter, appropriately filed and pleaded, and both courts' denial of their rights to discovery and their Seventh Amendment right to a jury trial is the reason for their petition.

VII. RESPONDENT PAYNE'S ARGUMENT "E" MAY BE CORRECT WITH RESPECT TO HIS "ENJOYMENT" OF ABSOLUTE IMMUNITY, BUT FAILS IN ALL OTHER RESPECTS AS A BASIS WARRANTING HIS DISMISSAL FROM THE CASE.

Respondent Payne's Argument "E", another regurgitation of the Fourth Circuit opinion, *may* be correct as to his alleged absolute immunity for suborning perjury and withholding of exculpatory evidence. However, as previously stated, at least at this stage, the Fourth Circuit was clearly in error in so ruling because the Smiths were entitled to discovery in order to determine what further role Payne may have had in the prosecution conspiracy after which Payne would have the burden of showing to a jury, or the court on a motion for summary judgment, that absolute immunity is justified for the function in question under the decision of the United States Supreme Court in *Burns v. Reed*, 500 U.S.

478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). The complaint clearly shows that Payne orchestrated a fixed trial to convict Donna Smith in order to defeat her claim for personal injuries. Absolute immunity cannot possibly be justified for *that* function.

Respondent Payne concedes that he would only be entitled for qualified immunity if he conspired with and advised the police officers to arrest the Smiths but seeks to avoid liability by relying on the conclusory statement of the Fourth Circuit that there was "no specific allegation that Respondent Payne Knew about, gave advice regarding, or otherwise participated in the arrest and search." This statement is untrue because under a required reading of the complaint, Payne *extrajudicially* advised the arrests of the Smiths on fabricated charges, *extrajudicially* advised the alteration, enlargement or deletion of the dispatch records, *extrajudicially* authored or directed the writing of the Confidential Supplement and *extrajudicially* advised the perjured testimony which he presented at trial. Also, after the trial, beginning with his receipt of the initial mailing from Tyler in February, 2007, and continuing to the present, Payne has been *extrajudicially* conducting the policy of denial and stonewalling, all clearly shown in the second count of the complaint.

CONCLUSION

Petitioners again respectfully request that the Supreme Court grant review of this matter for the foregoing reasons as well as the following:

1. Respondents McDonnell, Kaine, Dion and Rader have failed to file a brief in opposition and the statements of law and fact made by the petitioners with respect to their liability should be deemed as admitted under Supreme Court Rule 15.

2. Respondents Payne, McCarthy, Bridgwater, Dixon and Brantley have failed to address in any meaningful manner the statements of law and fact made in the petition with respect to them and the argument made by the petitioners with respect to their liability should be deemed as admitted under Supreme Court Rule 15.

Respectfully submitted,

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